

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
GREENE VALLEY LIQUORS, INC.	:	DETERMINATION
	:	DTA NO. 809691
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1985	:	
through November 30, 1986.	:	

Petitioner, Greene Valley Liquors, Inc., P.O. Box 428, Catskill, New York 12414, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1985 through November 30, 1986.

The Division of Taxation, by its representative William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel) has brought a motion pursuant to section 3000.5 (c) of the Rules of Practice and Procedure of the Tax Appeals Tribunal for an order granting summary determination and dismissing the petition on the ground that the Division of Tax Appeals lacks subject matter jurisdiction over the petition. Petitioner, by its representative, Mary Ann Tommaney, Esq., opposed the motion and requested a hearing on the merits of the petition. Based upon the moving papers, the affidavit of Donald C. DeWitt in support of the motion and Alexander Varga in opposition to the motion and upon all the pleadings, documents and other affidavits submitted, Jean Corigliano, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner timely filed a request for a conciliation conference.

FINDINGS OF FACT

On August 30, 1990, the Division of Taxation ("Division") mailed to petitioner, Greene Valley Liquors, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing tax due of \$31,248.91 plus penalty and interest.

The Division submitted the following evidence establishing the fact and date of the mailing of the notice to petitioner.

(a) The affidavit of Robert Keppel, an employee of the Division familiar with the mailing of notices of determination by the Division's Central Office Audit Bureau ("COAB"), describes the routine office procedures used by the Division to prepare such notices for mailing. The affidavit states it is the normal procedure of COAB to prepare a certified mailing record for each set of notices mailed by certified mail each day. By his affidavit, Mr. Keppel states that return receipts are not requested or obtained for notices sent by certified mail.

Mr. Keppel states that on August 3, 1990 he placed duplicate copies of a notice of determination addressed to petitioner in an envelope addressed to Greene Valley Liquors, Inc., c/o Grnvl Corp., P.O. Box 428, Catskill, New York 12414, after first comparing the notices and envelope to establish that they were addressed identically. According to the affidavit, he then followed the same procedure for 40 other notices of determination. The names and addresses appearing on the 41 envelopes stuffed by Mr. Keppel were listed on the certified mailing record. Mr. Keppel states that after preparing the envelopes for mailing he signed his name to an affidavit appearing on page 2 of each copy of the certified mailing record and that his signature was witnessed by Edward Van Denburgh, an employee of the Division designated to witness such signatures. Mr. Keppel states that he then wrapped the envelopes listed on the certified mailing record in three copies of the certified mailing record and placed the entire bundle in his office's outgoing mail basket. He states that a COAB employee physically transferred this bundle to the Division's outgoing mail unit which delivers such bundles to the United States Post Office.

(b) The affidavit of Daniel LaFar, a Principal Mail and Supply Clerk fully familiar with the Division's mailing procedures, describes the mailing of the notices. Upon receipt of the envelopes and copies of the certified mailing record, the mailroom staff affixes the proper postage to each envelope, counts the number of envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record. A member of the

mailroom staff then delivers the envelopes into the possession of the U.S. Postal Service. A postal service employee matches the envelopes against the names and addresses appearing on the certified mail record and places a U.S. Postal Service postmark on the certified mail record. A postmarked copy of the certified mail record is returned to Mr. LaFar's office which retains it for the Division's records.

(c) Submitted with the affidavits of Mr. Keppel and Mr. LaFar was a copy of a document entitled certified mailing record, dated August 3, 1990. Listed on the form is the name and address of petitioner and the certified mail number 499,695. Other names and addresses have been redacted. Page 2 of the certified mail record includes the signed affidavit referred to in Mr. Keppel's affidavit. It states:

"Enclosing the original and a true copy thereof in an envelope addressed as shown and by depositing same in an envelope, properly addressed in accordance with Tax Law 1147(a), under the exclusive care and custody of the United States Postal Service within the State of New York."

The affidavit is signed by Mr. Keppel, witnessed by Edward Van Denburgh and dated August 3, 1990. The certified mail record is signed by a Postal Service employee and bears a United States Postal Service date stamp of August 3, 1990.

Attached to the petition is a notice of determination addressed to petitioner, bearing certified mail number 499695.

The Division's Bureau of Conciliation and Mediation Services ("BCMS") received from petitioner a request for a conciliation conference, dated November 3, 1990 and a cover letter, also dated November 3, 1990, stating that the notice of determination dated August 3, 1990 was received by petitioner's president, Alexander Varga, on August 6, 1990.

November 1, 1990 is 90 days from the date of mailing of the notice of determination, August 3, 1990.

On March 22, 1991, BCMS issued a Conciliation Order denying petitioner's request for conference on the ground that the request was not received until November 13, 1990 and, therefore, was untimely.

In an affidavit, Mr. Varga states that at the time he received the notice of determination

it was his honest belief that the 90-day period for filing a request for a conciliation conference began to run on the date of receipt of the notice, in this case August 6, 1990. In any case, Mr. Varga alleges that the request for conciliation conference was mailed on November 3, 1990 and consequently was only two days late. He also states that he met with two employees of the Division's Tax Compliance Bureau on August 9, 1990 and informed them of his disagreement with the notice of determination. In light of the fact that the Division was not prejudiced by a two-day delay in the filing of the request for a conference and that the Division was informed of Mr. Varga's disagreement with the determination of tax due, Mr. Varga states that it would be inequitable to grant the Division's motion. In this regard, Mr. Varga points out that the Division's answer to the petition was more than three months late.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination, properly issued under article 28 of the Tax Law, "shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing". Notice of a determination is properly given, under Tax Law § 1147(a)(1), when the notice is mailed by certified mail. The 90-day time period for filing a petition is suspended if the taxpayer files a request for a conciliation conference under Tax Law § 170(3-a)(a). This request must itself be filed within 90 days of the date of mailing of the notice of determination (20 NYCRR 4000.3[c]).

B. Where a request for a conciliation conference has been denied on grounds of timeliness, the Division of Taxation is required to establish both the fact and the date of the mailing of the statutory notice (Matter of Winifredo Malpica, Tax Appeals Tribunal, July 19, 1990). Here the Division has established the mailing of the notice of determination on August 3, 1990 and petitioner has acknowledged its receipt on August 6, 1990 (see, Findings of Fact "2", "3" and "4").

C. Petitioner does not allege that the request for conciliation conference was mailed to the Division within 90 days of the mailing of the notice, rather he argues that the 90-day period

runs from the petitioner's receipt of the notice, not the mailing of the notice. Petitioner's authority for this proposition is Matter of Mareno v. State Tax Commn. (144 AD2d 114, 534 NYS2d 453). In that case, the petitioner denied receipt of the notice of determination altogether. The court held that the former State Tax Commission could rely on the certified postal receipt as confirmation that petitioner received the notice of determination on June 21, 1982. The court declined to overturn the Commission's finding that the notice was received on the same date that the Commission allegedly mailed the notice and refused to accept the seemingly contradictory nature of the facts as proof of nonreceipt of the notice of determination. There is nothing in the decision that supports petitioner's belief that the 90-day statutory period runs from the date of receipt.¹ Inasmuch as petitioner concedes that the request for conference was not mailed within 90 days of the mailing of the notice of determination, the request was untimely.

D. The remainder of petitioner's arguments amount to a request that the 90-day statutory period be waived in the interests of fairness. Petitioner notes that the request for conference was only two days late (based upon the allegation that the request was mailed on November 3, 1992, an allegation that petitioner did not prove) and that employees of the Division were aware of petitioner's disagreement with the assessment. A hearing cannot be granted on this basis.

Tax Law § 2006.4 provides in part:

"Where such a request [for a hearing] is made by a person seeking review of taxes determined or claimed to be due under this chapter, the liability of such person shall become finally and irrevocably fixed, unless such person, within ninety days from the time such liability is assessed, shall petition the division of tax appeals for a hearing to review such liability."

Inasmuch as petitioner failed to file a petition or request a conference within the 90-day period, the Division of Tax Appeals lacks the statutory authority to conduct a hearing, and it has no authority to provide an equitable remedy for the late filing of a petition (see, Matter of

¹It has been held that where the Division fails to prove the fact and date of mailing of the notice of determination the petition must be deemed timely (see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). That is not the situation here.

Daniel B. Rathgaber, Tax Appeals Tribunal, April 5, 1990).

E. The motion for summary determination is granted, and the petition of Greene Valley Liquors, Inc. is dismissed.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE